Supreme Court, U.S.
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No. 92-1407

In The

Supreme Court of the United States

October Term, 1992

PATRICIA WILLIAMS HOWARD,

Petitioner,

v.

WOLFF BROADCASTING CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Alabama

PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED

1. Whether an Equal Protection claim was presented in the courts below?

2. Whether there is state action?

3. Whether Alabama's "at will" doctrine violates the Equal Protection Clause of the Fourteenth Amendment?

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SUMMARY OF ARGUMENT

Throughout the course of the proceedings of her case in the Alabama courts, Petitioner repeatedly asserted that she was fired in violation of her rights, specifically her right not to be discriminated against regarding employment. In ruling adversely to her claims, the Alabama Supreme Court has enforced her former employer's discriminatory conduct and given other similarly situated employers a vehicle through which they may also discriminate against their employees. Petitioner's present claim that her right to Equal Protection of the Law was violated was implicitly, yet forcefully, presented to the Alabama courts at each stage of the proceedings below. The action taken by the Alabama Supreme Court in upholding the unfavorable ruling of the Circuit Court of Conecuh County was done in violation of her right to Equal Protection of the Law, as guaranteed her by the Fourteenth Amendment of the United States Constitution. Petitioner should not be denied an opportunity to present her claims to this Court.

REASONS FOR GRANTING THE WRIT

I. A FEDERAL QUESTION WAS ADEQUATELY PRESENTED IN THE COURTS BELOW.

Respondent argues that Petitioner failed to apprise the Alabama courts of the existence of a Federal Question in her case. In fact, the very essence of Petitioner's claims is a violation of rights secured to her under the doctrine of Equal Protection. Petitioner was unable to pursue a Federal remedy as such, since the body of law under which a similarly situated person would seek redress specifically exempts her from its coverage. *See* 42 USC

§ 2000e *et seq.*; Petitioner's Brief at 12. Therefore, Petitioner had no choice but to pursue her claims in the guise of Alabama common-law remedies.

This Court has recently urged that the "pressed or passed upon below" rule, upon which Respondent bases its arguments, is merely prudential in nature, and not jurisdictional. *See Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 108 S.Ct. 1645, 100 L.Ed.2d 62 (1988); *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). The *Illinois v. Gates* court noted that, on many occasions, this Court has heard arguments and made important decisions based on grounds which were not asserted in the state courts below, citing *Terminiello v. Chicago*, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949) and *Vachon v. New Hampshire*, 414 U.S. 478, 94 S.Ct. 664, 38 L.Ed.2d 666 (1974) as examples. In each of the above-cited cases, this Court noted that the parties did not raise the questions presented for review in the courts below, yet still granted certiorari. Moreover, this Court has heard arguments that were not raised below simply because an important constitutional question was raised by the case before it. *See Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961). In the instant case, the more prudent holding would be to grant certiorari, as Petitioner's claims deal with the violation of an important right – that of being able to secure and maintain employment in a discrimination-free environment.

It was emphasized in Respondent's Opposition Brief that Petitioner did not specifically argue that her right to Equal Protection of the Law had been violated by the actions of her former employer, or that her right would be violated if the Alabama courts ruled adversely to her interests. *See* Respondent's Brief at 9, 11. However, this

Court has held that "[n]o particular form of words or phrases is essential [to assert a claim of invalidity], but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time." *Street v. New York*, 394 U.S. 576, 584, 89 S.Ct. 1354, 1361-62, 22 L.Ed.2d 572, ___ (1969), citing *New York ex rel Bryant v. Zimmerman*, 278 U.S. 63, 67, 49 S.Ct. 61, 63, 73 L.Ed. 184, ___ (1928). In the same case, this Court also stated that "if the record *as a whole* shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *Id.* (emphasis added). At each stage of the proceedings in the Alabama courts, Petitioner was clear in her assertion that she lost her job solely because she is female. Further, her assertion was recognized by the Supreme Court of Alabama, as it noted in the first line of its Opinion of November 25, 1992. *See* Pet. Brief at 1b. Certainly, the Alabama courts were apprised of the basic nature of her claims.

In its Opposition Brief, Respondent cited at length from *Webb v. Webb*, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981). *See* Res. Brief at 11-13. Notably, Respondent cited that "there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim." Res. Brief at 13. However, Respondent failed to note that the *Webb* decision also stated that "[a]lthough it would avoid uncertainty and the expenditure of much time and effort if litigants identified in the state courts precisely the provisions of the Federal Constitution or the federal statute on which they rely, we have not insisted on such inflexible specificity." *Webb v.*

Webb, 451 U.S. at 501, 101 S.Ct. at 1894, 68 L.Ed.2d at ___. At the state level, Respondent argued at length that Petitioner should have brought her claim under the auspices of 42 USC § 2000e *et seq*. In response, Petitioner argued that the aforementioned Federal remedy was not available to her for the purposes of recovery against her employer. Again, the issue in question was "pressed" with the Alabama Courts.

"[I]f the necessary effect of the judgment has been to deny the claim, that is enough." *New York ex rel Bryant v. Zimmerman, supra*, at 278 U.S. 67, 49 S.Ct. 63, 73 L.Ed. ___. In upholding the Summary Judgment granted by the Circuit Court of Conecuh County, the Alabama Supreme Court has decidedly denied Petitioner's Claims. Therefore, the Alabama courts have effectively "passed" on Petitioner's claims as well. Therefore, this Court should grant Certiorari and hear Petitioner's claim sounding in Equal Protection.

A particularly persuasive case illustrating Petitioner's argument is *Jones National Bank v. Yates*, 240 U.S. 541, 36 S.Ct. 429, 60 L.Ed. 788 (1916). Although the above-cited case was decided many years ago, its logic is still irrefutable. In *Jones National Bank v. Yates*, the Federal issue sought to be decided by this Court was not raised in specific terms by the Petitioner at any time in the proceedings below. In fact, the Federal question was discussed exclusively by the Respondent in said action. Eventually, the state court held adversely to the Petitioner, and said Petitioner presented its Federal question to this Court for review. In granting certiorari, this Court held that "[t]he fact that their petitions did not refer, in terms, to the Federal statute is not controlling . . . The conclusion of the trial court that there could be a recovery

at common law, independent of the Federal statute, did not alter the inherent character of the action." *Id.* at 240 U.S. ___, 36 S.Ct. 433, 60 L.Ed. ___.

In the instant case, Petitioner did not specifically allege that the actions of her employer were violative of her right to Equal Protection of the Law, nor did she specifically allege that her right to Equal Protection of the Law would be violated if the Alabama courts denied her any recovery. However, Petitioner repeatedly stated that the impetus behind each of her claims was the implied promise that she would not be discriminated against because of her sex. Respondent also emphasized the gist of Petitioner's arguments to the Alabama courts, by insisting that she had raised a Federal issue, under 42 USC § 2000e *et seq*. Finally, the Alabama Supreme Court noted that Petitioner was the victim of sex discrimination by Respondent. A claim sounding in sex discrimination inherently alleges a violation of Equal Protection, as such actions invariably present a class of persons who are deprived of a certain right. It is obvious that the Alabama Supreme Court was sufficiently apprised of the nature of Petitioner's arguments, and that its November 25, 1992, decision denied her implicit claim of constitutional infirmity under Fourteenth Amendment Equal Protection analysis.

Petitioner also notes that her claim alleging a violation of Equal Protection did not arise until the Alabama Supreme Court announced its decision on November 25, 1992. By its express terms, the Fourteenth Amendment requires state action as a condition precedent to bringing an action for a violation of Equal Protection. In the instant case, the requisite state action is that of the Alabama

Supreme Court's ruling. Therefore, Petitioner's claim did not truly arise until that time.

II. ACTS OF THE JUDICIARY ARE STATE ACTION.

Respondent also argues that the action taken by the Alabama Supreme Court which, in effect, gave employers in the state a license to discriminate against their at-will employees, is not "state action" as is required to sustain a Fourteenth Amendment claim. *See* Res. Brief at 15. In support of its argument, Respondent cites case law holding that a government can usually only be held responsible for a private decision when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the government. *Id*, citing *San Francisco Arts and Athletics, Inc. v. U.S. Olympic Committee*, 483 U.S. 522, 546, 107 S.Ct. 2971, ___, 97 L.Ed.2d 427, ___ (1987). Respondent also argues that heavy state regulation of business interest does not convert private acts into those of the state. *Id*, citing *Jackson v. Metropolitan Edison Co*, 419 U.S. 345, 350, 95 S.Ct. 449, 453, 42 L.Ed.2d 477 (1974). Respondent has stated a correct interpretation of the law as it relates to the degree of government involvement necessary to attribute an individual's actions to the state. However, its argument relating to extensive regulation is flawed, as Petitioner's claim involves an action of the Alabama *judiciary* denying her right to Equal Protection.

"[A] state may act through different agencies, either by its legislative, its executive or its judicial authorities; and the prohibitions of the [Fourteenth] Amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies

or by another. " *Shelly v. Kraemer*, 334 U.S. 1, 14, 68 S.Ct. 836, 842, 92 L.Ed. 1161, ___ (1948), citing *Commonwealth of Virginia v. Rives*, 100 U.S. 313, 25 L.Ed. 667 (1800). The *Shelly v. Kraemer* Court also noted various instances in which the Court had previously ruled that actions of the judiciary are state action within the meaning of Fourteenth Amendment Equal Protection. *Id.* at 334 U.S. 15, 68 S.Ct. 843, 92 L.Ed. ___. Finally, the Court held that "when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands." *Id.* at 334 U.S. 20, 68 S.Ct. 845, 92 L.Ed. ___.

Respondent attempts to distinguish Petitioner's authority regarding state action by stating that each of the cases cited by Petitioner are limited to their facts. However, Respondent cites no legal authority in which a judicial act was *not* deemed a state action. In fact, all of Respondent's authority involve situations of regulation by the state, not instances of judicial action. Conversely, each of Petitioner's cited cases involve situations in which the courts of different states upheld and enforced discriminatory and illegal acts of individuals. Moreover, the action by the Alabama Supreme Court which Petitioner claims denied her right to Equal Protection of the Law goes far beyond "mere approval or acquiescence in the initiatives of a private party," as Respondent was sure to warn against in its Opposition Brief. *See* Res. Brief at 16, citing *Blum v. Yaretsky*, 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982). In upholding the Summary Judgment of the Circuit Court of Conecuh County, the Alabama Supreme Court has granted its explicit approval of, and permission for, employment discrimination on the basis

of sex. This court cannot similarly enforce such conduct by employers.

III. ALABAMA'S "AT WILL" DOCTRINE, AS APPLIED IN THIS CASE, VIOLATES EQUAL PROTECTION.

Respondent's final argument is that Petitioner has not made a prima facie case under the Equal Protection Clause of the Fourteenth Amendment. In support of its argument, Petitioner cites case law holding that a claim based on the Equal Protection Clause requires evidence of a discriminatory purpose. *See* Res. Brief at 19-20. In fact, the Alabama Supreme Court's denial of Petitioner's claim was an intentional deprivation of her right to Equal Protection under the law. The discriminatory impact of its decision cannot be ignored by this Court. Thus, the Alabama Court's actions cannot be seen as anything other than intentional.

Respondent urges that the Alabama "at will" doctrine does not violate Equal Protection, and that it is neutral in its application to this case. *See* Res. Brief at 18. Respondent cites *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979) for the proposition that a showing of "discriminatory purpose" requires more as intent than volition or awareness of consequences. *See* Res. Brief at 20. In the instant case, Petitioner repeatedly asserted that her right to not be discriminated against in her employment had been violated by the actions of her former employer. The Alabama courts were well aware of the implications of their various holdings. Additionally, the courts were given the opportunity to grant Petitioner an appropriate remedy by

adopting a public policy exception to the "at will" doctrine. It cannot be denied that the Alabama courts acted with a discriminatory purpose.

It is well-settled that discriminatory impact alone will not support a Fourteenth Amendment Equal Protection claim. *See Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed. 597 (1976). However, the inevitability of the effects to be wrought by an adverse decision by the Alabama court cannot be ignored in discerning its intent. Regarding the broad statements it made as to the level of proof necessary to establish the requisite intent to discriminate, the *Feeney* court noted that:

> [t]his is not to say that the inevitability or foreseeability of consequences of a neutral rule has no bearing upon the existence of discriminatory intent. Certainly, when the adverse consequences of a law upon an identifiable group are as inevitable as the gender-based consequences of [the statute at issue], a strong inference that the adverse effects were desired can reasonably be drawn.

Id. at n. 25, 442 U.S. 279, 99 S.Ct. 2296, 60 L.Ed.2d ___. *See also Hernandez v. New York*, ___ U.S. ___, 111 S.Ct. 1859, 1867, 114 L.Ed.2d 395, ___ (1991).

"Classifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination." *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 273, 99 S.Ct. 2282, 2293, 60 L.Ed.2d 870, ___ (1979), citing *Caban v. Mohammed*, 441 U.S. 380, 398, 99 S.Ct. 1760, 1771, 60 L.Ed.2d 297, ___ (Stewart, J., dissenting). Therefore, this Court should take all the surrounding circumstances into account in making its determination as to whether the Alabama Supreme Court possessed the requisite intent to discriminate against Petitioner in making its November 25, 1992 ruling.

CONCLUSION

On November 25, 1992, the Alabama Supreme Court held that Respondent had a right to terminate Petitioner's employment solely because she is female. In its Opposition Brief, Respondent notes the fact that a bill prohibiting employment discrimination on the basis of sex has been proposed in the Alabama Senate. However, said legislation will not redress the deprivation of rights that Petitioner has already suffered. The opinion in question has sanctioned discrimination by private employers, and said employers will continue to conduct such activities until the proposed legislation is signed into law. Such activities cannot be condoned by the courts of this nation.

Petitioner's fate is in the hands of this Court, as is the fate of all women in similar situations. Petitioner presented her claims to the courts below, and entrusted her future to the wisdom of the Alabama Judiciary. However, the judicial mechanism in Alabama failed in this instance, denying Petitioner's claims based on sex discrimination and thereby violating her right to Equal Protection of the Law. The approval and encouragement of such actions must stop with this Court. Therefore, the Petition for Writ of Certiorari must be granted.

Respectfully submitted,

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